TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No 1453

JOSEPH CHURCH AND CHARLES J. CHURCH, PLAINTIFFS IN ERROR,

vs.

HELEN M. KELSEY, CYRENNES WISE AND ANN WISE, HIS WIFE, SIDNEY PHILIP STEVENS, LETTY ANN RULAND, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

FILED OCTOBER 21, 1889.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, OCTOBER 24, 1889.

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1 UNITED STATES OF AMERICA, *ss:*

Seal of the Supreme Court of the United States.

The President of the United States of America to the honorable the judges of the supreme court of the State of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit, between Joseph Church and Charles J. Church, appellants, and Helen M. Kelsey, Cyrennes Wise and Ann Wise, his wife; Sidney Philip Stevens, Letty Ann Ruland, and L. T. Brown and Rozelle, his wife; F. E. Medway and Jennie, his wife; Zelda Stevens, Caleb E. Wright, Samuel Linn, Isaac P. Hand, Henry W. Palmer, C. F. Williams, Elisha Griffin, and J. McKeil Stevens, appellees, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Con-

2 stitution or of a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said appellants, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the fourth day of May, in the year of our Lord one thousand eight hundred and eighty-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

May 4th, 1889.

Allowed by—
JOSEPH P. BRADLEY,
Associate Justice of the Supreme Court U. S.

1—1453

3 STATE OF PENNSYLVANIA, } ss:
City and County of Philadelphia, }

To the honorable the justices of the Supreme Court of the United States:

The record and proceedings, with all things concerning the same, in the within-mentioned cause are herewith returned as within commanded.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

CHAS. S. GREENE,
Prothonotary.

4 *Recognizance to United States Supreme Court.*

Know all men by these presents that we, Joseph Church and Charles J. Church and Isaac B. Felts, all of Lackawanna county, State of Pennsylvania, are held and firmly bound unto Helen M. Kelsey, Cyrenius Wise, and Ann Wise, his wife; Sidney Philip Stevens, Letty Ann Ruland, L. T. Brown and Rozello, his wife; F. E. Medway and Jennie, his wife; Zella Stevens, Caleb E. Wright, Samuel Linn, Isaac P. Hand, Henry W. Palmer, C. F. Williams, Elisha Griffin, J. McKiel Stevens, in the full and just sum of one thousand dollars, to be paid to the said obligees or their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this twenty-third day of April, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas lately, at a term of the supreme court of Pennsylvania, in a suit depending in said court between the said Joseph Church and Charles J. Church, obligors, as appellants, and the said obligees as appellees, a decree was rendered against the said Joseph Church and Charles J. Church, and the said Joseph Church and Charles J. Church having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said obligees citing and admonishing them to be and appear at a Supreme Court of the
5 United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Joseph Church and Charles J. Church shall prosecute their writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

JOSEPH CHURCH. [SEAL.]
CHARLES J. CHURCH. [SEAL.]
ISAAC B. FELTS. [SEAL.]

May 4th, 1889.

Approved by—

JOSEPH P. BRADLEY,
Assoc. Justice, Sup. C't U. S.

I hereby certify that the above is a true and correct copy of the bond filed in above case.

In testimony whereof I have hereunto set my hand and the seal of said court, at Philadelphia, this 19th day of October, A. D. 1889.

CHAS. S. GREENE,
Prothonotary.

6 The United States of America to Helen M. Kelsey, Cyrennes Wise, and Ann Wise, his wife; Sidney Philip Stevens, Letty Ann Ruland; L. T. Brown and Rozelle, his wife; F. E. Medway and Jennie, his wife; Zelda Stevens, Caleb E. Wright, Samuel Linn, Isaac P. Hand, Henry W. Palmer, C. F. Williams, Elisha Griffin, and J. McKeil Stevens, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Pennsylvania, wherein Joseph Church and Charles J. Church are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the decree rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Joseph P. Bradley, associate justice of the Supreme Court of the United States, this fourth day of May, in the year of our Lord one thousand eight hundred and eighty-nine.

JOSEPH P. BRADLEY,
Asso. Justice, Sup. C't U. S.

Copy served and service accepted this 5th day of September, A. D. 1889.

H. W. PALMER,
Att'y for D'fe'ts.

On this — day of ——, in the year of our Lord one thousand eight hundred and eighty—, personally appeared —— —— before me, the subscriber, —— ——, and makes oath that he delivered a true copy of the within citation to —— ——.

Sworn to and subscribed the ——, A. D. 188–.

—— ——.

In the Court of Common Pleas of Lackawanna County, Sitting in Equity.

Between—

HELEN M. KELSEY, CYREMUS WISE, and ANN WISE, His Wife, in Right of said Ann; Sidney Philip Stevens, Letta Ann Ruland; L. T. Brown and Rozelle, His Wife, late Rozelle Stevens, in Right of said Rozelle; F. E. Medway and Jennie, His Wife, in Right of said Jennie; Lillie Stevens, Zelda Stevens, Caleb E. Wright, Samuel Linn, Isaac P. Hand, Henry W. Palmer, C. F. Williams, Elisha Griffin, and J. McKiel Stevens, Plaintiffs,
and
JOS. CHURCH and CHAS. CHURCH, Minor Son and Heir of Charlotte Church, Deceased, Defendants.

No. 5. Jan'y T., 1883.

To the honorable the judges of said court:

Your orators complain and say—

First. That Thomas Griffin in his lifetime was seized in his demesne as of fee of and in all that certain messuage and tract of land situate in the city of Scranton, in the county of Lackawanna,
8 bounded and described as follows, viz: On the east by the Lackawanna river, on the south by land now or formerly of Philo Griffin and H. S. Pierce, on the west by the Delaware, Lackawanna and Western railroad, and on the north by the land of F. A. Griffin and John Frances, containing forty acres, be the same more or less.

Second. That the said Thomas Griffin died on the 18th day of March, A. D. 1854, having first made his last will and testament dated the 27th day of March, 1852, which was admitted to probate by the register of Luzerne county on the 3d of April, 1854, the said tract of land upon which the said Thomas Griffin resided at the time of his death being then in the county of Luzerne.

Third. That the said Thomas Griffin in and by his last will and testament devised the tract of land described in the first paragraph of this bill to his daughter, Letta Griffin, subject, however, to an express trust accepted by the said Letta when the said will was made that she should hold and enjoy the same during the term of her natural life, and that at her death she should convey or devise the one undivided half thereof to the children of her deceased sister, Charlotte Stevens, and that in pursuance of the said devise and the trust to which it was subject as aforesaid did enter upon, possess, and enjoy the said tract of land until the time of her death, which occurred on the 27th day of March, 1867.

Fourth. That the said Letta Griffin died without having executed the trust in favor of the children of her sister, Charlotte Stevens

aforesaid, and leaving in possession of the said Joseph Church and Charlotte, his wife, formerly Charlotte Stevens, to whom he had become intermarried, and that after the death of said Letta Griffin they, the said Joseph Church and Charlotte, his wife, denied the said trust and claimed to be the sole owners of said land under deed and devise from the said Letta Griffin.

9 Fifth. That afterwards, to wit, to No. 3, January term, 1872, a bill in equity was filed in the court of common pleas of Luzerne county, of which Lackawanna county then constituted a part, by Griffin Stevens, A. Ruland, and Letta Ann Ruland, his wife, in right of the wife; J. McKiel Stevens, Peter Marsh, and Louisa Marsh, his wife, in right of the wife; Helen Kelsey, Cyremus Wise and Ann Wise, his wife, in right of the wife; Sidney Philip Stevens, and Rozelle, Lillie, Zelda, and Jennie Stevens, minor children and heirs-at-law of B. Jerome Stevens, deceased, by their next friend, C. Wise, against Joseph Church and Charlotte Church, in which said bill the said plaintiffs therein prayed, *inter alia*, that the defendants therein be decreed to execute and deliver to the plaintiffs deeds for their respective interests in said piece of land, and such further proceedings were had in said suit that afterwards, to wit, on the 5th of February, 1877, the said court made the following final decree therein:

"This cause came on for hearing and was argued by counsel, whereupon, upon due consideration thereof, it is now, February 5, 1877, ordered, adjudged, and decreed that the defendants, by deed duly executed, acknowledged, and filed in the office of the prothonotary, on or before the 20th day of February, instant, convey in fee to Letta Ann Ruland an undivided one-sixteenth part of a lot of land situate in the second ward of the city of Scranton, in Luzerne county, bounded and described as follows, viz: On the east by the Lackawanna river, on the south by lands now or formerly of Philo Griffin and H. S. Pierce, on the west by the Delaware, Lackawanna and Western railroad, on the north by lands now or formerly of F. A. Griffin and John Frances, containing forty acres, be the same more or less, and being the same land which Thomas Griffin, deceased, by his last will and testament, bearing date the 27th day of March, A. D. 1852, and proved before the register of wills of Luzerne county on the 3d

10 day of April, 1854, devised to Letta Griffin; excepting, however, out of said conveyance all that part of said land which Letta Griffin, by articles of agreement dated September 27th, 1864, contracted to sell to A. H. Noll, by description as follows: Beginning at a corner in the center of the road leading from Providence to Scranton, thence east, by lands of Philo Griffin, about four chains and seventy-five links; thence north, by lands of Philo Griffin and Letta Griffin, far enough to make one acre of land, with a line running parallel with south line to center of said road to the place of beginning—one acre of land, strict measure.

"And it is further ordered, adjudged, and decreed that Charlotte Church, one of the defendants, holds the legal title of the lands herein described (excepting as above), as to one undivided one-six-

teenth part thereof in trust for J. McKiel Stevens, as to an undivided one-sixteenth for Griffin Stevens, as to an undivided one-sixteenth part for Louisa Marsh, as to an undivided one-sixteenth part for Ann Wise, as to an undivided one-sixteenth part for Philip Stevens, and as to an undivided one-sixteenth part for the minor children of B. Jerome Stevens, deceased, to wit, Rozelle, Lillie, Zelda, and Jennie Stevens, and that the said defendants, by deed duly executed, acknowledged, and filed in the office of the prothonotary for delivery to the grantees on or before the 10th day of March next, convey in fee to the *cestui que trusts* herein named the said several undivided one-sixteenth parts of the land herein first described, excepting the one acre contracted as before stated to A. H. Noll.

"And it is further ordered that the defendants pay the costs."

Sixth. That afterwards, to wit, on the 1st of February, 1878, the aforesaid decree was amended by the said court *nunc pro tunc* as follows:

"In the master's report and in the decree a mistake oc-
11 curred in finding that the share of each of the heirs of Charlotte Stevens, deceased, in the undivided one-half of the land described in the plaintiff's bill is one undivided sixteenth. The bill, which in this respect was unquestioned, sets forth the names of said heirs, and the whole case shows and the master so reported and the court intended to decree that each child of Charlotte Stevens and the children of deceased as the representative of their deceased parent should have an equal undivided share in the undivided one-half of the land described. There were nine children, including Charlotte Church, one of the defendants, and Helen Kelsey, one of the plaintiffs, whose name was, by mistake, omitted in the decree. It follows that the share of each heir should have been declared to be an undivided one-eighteenth instead of an undivided one-sixteenth of the land held in trust by Mrs. Church. In an action of ejectment Letta Ann Ruland, one of the heirs, recovered in ejectment against the defendants the undivided one-sixteenth of the land described, but by writing filed herewith she consents that the decree be entered that her share or purpart is but one-eighteenth.

"The mistake as to the share or purpart of each of the heirs, the plaintiffs in the bill, having been lately brought to my notice, as well as that of the omission of the name of Helen Kelsey in the decree as to the deed to be made by the defendants, and notice having been given to the solicitors of the defendants of an application to amend the record according to the facts, I have, upon due consideration, concluded to cause the same to be done in order to correct an evident clerical mistake of the master and a like mistake on the part of the court, and also the omission by mistake of the name of Helen Kelsey, one of the plaintiffs, in the decree.

"It is now, February 1, 1878, ordered as of February 5, 1877, that the report of the master as to the share or purpart of the plain-
tiffs be corrected so that one share or purpart shall be de-
12 clared to be an undivided one-eighteenth instead of one-sixteenth, and that the decree be amended by striking out the words one-sixteenth, wherever they occur in the decree, and inserting

in lieu thereof the words one-eighteenth, and after the name Philip Stevens, where it occurs in the decree, insert as to an undivided one-eighteenth part thereof to Helen Kelsey; and the said decree is now amended accordingly as of the said 5th day of February, 1877.

"And it is further ordered that the deed made by the defendants and now on file in the office of the prothonotary may be withdrawn upon the filing of a deed to the plaintiffs in accordance with the amended decree.

"And it is ordered and decreed that a deed be made in accordance with the amended decree and that the same be filed in the office of the prothonotary upon the terms of the order heretofore made, and that the expense of preparing and executing and acknowledging said last-mentioned deed be borne by the plaintiffs."

Seventh. That since the making of the said final decree and the amendment thereof as follows the said children and grandchildren of Charlotte Stevens, with the exception of Charlotte Church, have jointly conveyed the undivided eight-ninetieths of said land to Caleb E. Wright, Samuel Linn, Isaac P. Hand, and H. W. Palmer; Louisa Marsh has conveyed the undivided four-ninetieths thereof to C. F. Williams, and Griffin Stevens has conveyed the undivided four-ninetieths thereof to Elisha Griffin; that the said Charlotte Church, in her lifetime, acquired the one undivided half of said land by devise in fee from the said Letta Griffin, so that now the said tract of land is held by the following-named persons as tenants in common in fee in the following proportions by the following-named persons (excepting the lot agreed to be conveyed by Letta Griffin to A. H. Noll, as mentioned in the foregoing final decree): The undi-
13 vided fifty-ninetieths, by Charles Church, subject to the right of tenancy by the courtesy of Joseph Church; Elisha Griffin, Helen M. Kelsey, S. P. Stevens, C. F. Williams, Letta Ann Ruland, Ann Wise, and J. M. Stevens, each four-ninetieths; Rozelle Brown, Jennie Medway, Lillie Stevens, and Zelda Stevens, each one-ninetieth, and Caleb E. Wright, Samuel Linn, Isaac P. Hand, and Henry W. Palmer, each two-ninetieths.

Eighth. That no deed was ever made by the said Joseph Church and Charlotte Church in pursuance of the said amended decree, but that the said Charlotte Church died on or about the 16th of July, 1880, without having complied with the said amended decree of said court, although she, together with her husband, the said Joseph Church, were notified and required so to do.

Ninth. The said Charlotte Church left surviving her a son, named Charles Church, who was at the time of her death and still is a minor, and has for his guardian his father, the above-named Joseph Church.

Tenth. That it will be for the advantage of all parties, as it is their right, to have partition made of the said premises according to law; and if it should appear to your honorable court that the said real estate cannot be divided without prejudice to the owners, then it will be to the advantage of all parties that the same should be sold in the manner directed by law.

They therefore pray relief as follows:

1. That a decree of this honorable court may be made parting and dividing the said land hereinbefore described in the decree of the court of common pleas of Luzerne county, sitting in equity, among the parties entitled thereto as their interests are set forth in the foregoing bill of complaint, and for such other and further relief as your orators' case may require and to your honors seem meet.

14 2. May it please your honors to direct the said defendants, upon service upon them of a copy of this bill at a certain time and in the manner by the rules of court provided, to come and enter their appearance as defendants therein, and then and there full, direct, and true answer make to all and singular the premises and to perform and abide such further order, direction, and decree therein as to your honorable court shall seem meet.

ISAAC P. HAND,
HENRY W. PALMER,
SAMUEL LINN,
Solicitors for Complainants.

In the Court of Common Pleas of Lackawanna County, Sitting in Equity. January Term, 1883.

HELEN M. KELSEY *et al.*
v.
JOSEPH CHURCH *et al.* } No. 5.

Answer of Defendants.

1. We admit the statements of the first and second paragraphs of complainants' bill to be substantially correct.

2. We deny that Thomas Griffin in and by his last will devised the land mentioned in the bill to his daughter, Letta Griffin, subject to an express trust, as set forth in the third paragraph of the said bill, and we assert the contrary thereof to be the truth, to wit, that the devise to Letta Griffin by her father, Thomas Griffin, in his last will and testament was absolute and vested the title in her absolutely without trust or restriction or limitation of any kind, and that she possessed and enjoyed the said devised premises and treated them as absolutely her own, unaffected by any trust or con-

15 dition whatever, and as such absolute owner she sold and conveyed the same at her pleasure.

3. We admit that there were proceedings in equity, which are partially set forth in the fifth and sixth paragraphs of complainants' bill, but for greater certainty as to the character of the said proceedings we pray leave to refer to the whole record of the said case; and we deny that the said proceedings were and are sufficient to vest any title in the complainants to the land in question or to authorize them to seek and obtain a partition such as is sought in their bill.

4. As to what conveyances may have been made among the parties named in the seventh paragraph of the bill we are not sufficiently informed to answer, but we deny that any of the parties thus named

are tenants in common in fee with us, the defendants, of the lands mentioned in the bill or of any part thereof, or that they are in anywise entitled or have shown by their bill any title or right to partition as sought in their bill.

5. And we further aver that we are seized of the full legal title to the premises mentioned in the bill by virtue of a *bona fide* purchase for a valuable consideration without notice of any trust of any kind, by virtue of which possession was taken as early as the year A. D. eighteen hundred and sixty-seven, and has been continuously held ever since by our ancestors and ourselves, and we claim the same benefit of this defence as if we had interposed the same by way of plea.

And we further aver that the complainants have not in and by their bill set forth such a case as is within the jurisdiction of a court of equity, and that it is the right of defendants to have, hold, and maintain their title to the land in question regularly at law,
16 a right guaranteed to them both by the Constitution of the United States and the constitution of this State.

And we therefore pray to be hence dismissed with our reasonable costs in this behalf wrongfully sustained.

A. RICKETTS,
Counsel for Defendants.

LACKAWANNA COUNTY, *ss:*

Joseph Church, being duly sworn, says that the facts set forth in the foregoing answer are true so far as set forth of his own knowledge, and so far as set forth on information and belief that he verily believes them to be true.

JOSEPH CHURCH.

Sworn and subscribed this 7th day of July, A. D. 1883, before—
[SEAL.] A. D. DEAN,
Notary Public.

17 *Decree.*

Now, to wit, January 21st, 1886, this cause came on to be further heard on exceptions to the report of the master and commissioners, to whom the same was referred for the purpose of partitioning the land described in the bill between the plaintiffs and defendants, at this term and was argued by counsel, and thereupon, upon due consideration thereof, it is ordered, adjudged, and decreed as follows, viz: That the exceptions to the said report be, and the same are hereby, dismissed, and the said report is approved and confirmed; and it is further decreed that the partition of the land made by the master and commissioners aforesaid between the plaintiffs and defendants be and remain firm and stable forever, and that the respective parties hold the purparts severally allotted to them and described in the report of the commissioners unto them, their heirs and assigns, in severalty forever, and that the purpart awarded to

Charles Church, minor son and heir of Charlotte Church, deceased, shall be subject to the rights of Joseph Church, as tenant by the curtesy therein.

And it is further ordered, adjudged, and decreed that the said Joseph Church and Charles Church, by his guardian, Joseph Church, shall execute and file in the office of the prothonotary of said county, within ten days from the date of filing this decree, a good and sufficient deed in fee simple to the said plaintiffs for the purpart of said land awarded to them by the said master and
18 commissioners, describing the same by metes and bounds, such conveyance being requisite for vesting in the said plaintiffs a complete legal title to the said purparts allotted to them; and it is further ordered, adjudged, and decreed that the costs in this case, with an allowance of one hundred and fifty dollars to the plaintiffs for counsel fees, which is hereby adjudged to be a reasonable allowance and is hereby taxed as part of said costs, in pursuance of the act of Assembly in such case made and provided, shall be paid by all the parties in proportion to their several interests, to wit: Four-ninths of the said costs to be paid by the said plaintiffs and five-ninths of said costs to be paid by the said defendants.

By the COURT.

Proceedings Subsequent to Decree.

AUGUST 2D, 1886.

Attachment issued against Joseph Church and Charles J. Church.

"Now, August 2d, 1886, the defendants having complied with the decree in this case by filing a proper deed to the plaintiffs in accordance with the said decree and having paid their proportion of the costs, they are hereby discharged from the within attachment.

"R. W. ARCHBALD, *A. L. J.*"

Petition for Writ of Assistance.

To the court of common pleas of Lackawanna county, sitting in equity:

The petition of the plaintiffs respectfully represents that under and by virtue of the decree in the above-stated case certain
19 lands in said decree described were allotted to the plaintiffs and conveyance thereof was made by the defendants to them which was duly recorded.

That said defendants by themselves and their tenants, one Clark and one ——, have continued in possession of said land thus allotted and conveyed, with the buildings and improvements, and refuse to deliver the same to the plaintiffs and declare that they will not surrender their possession, thus wrongfully continued, until an action of ejectment is brought against them and judgment obtained therein.

Wherefore your petitioners pray that a writ of assistance may be issued by your honorable court, directed to the sheriff, commanding

him to remove the said Joseph Church and Charles J. Church and all persons claiming under them from the lands allotted to your petitioners as aforesaid and described in the said decree and conveyance and the possession thereof to deliver to the plaintiffs, and that the costs of executing said writ shall be paid by said defendants.

And they will ever pray, etc.

H. W. PALMER,
Att'y for Petitioners.

Now, to wit, July 12, 1887, the plaintiffs move that a writ of assistance issue to the sheriff commanding him to deliver possession of the land allotted to the plaintiffs to them; motion to be heard July 18th, at 10 a. m.; notice to be given defendants.

R. W. ARCHBALD,
Add. Law Judge.

Answer of Defendants.

LACKAWANNA COUNTY, *ss:*

Joseph Church and Charles J. Church, being severally sworn, do each say that the application and affidavit of the plaintiffs in
20 this matter in so far as the same may be intended to convey the idea that there has been served any decree or order for the delivery of possession of any lands by the defendants to the plaintiffs is wholly untrue, inasmuch as no order or decree for the delivery of the possession of any lands has ever been served upon these defendants by any one at any time.

Second. That no such decree, to wit, a decree for the delivery of possession of any land by these defendants to these plaintiffs, was ever made in the said case.

Third. That there was no prayer for such decree in the bill filed in the said case, and nothing is set forth in the bill or claim of the said plaintiffs as set forth therein to warrant such prayer or decree.

Fourth. That as to a portion of the lands for which this writ of assistance to compel these defendants to deliver possession is asked the same is in the possession of one John Keithline, who with his predecessors in the title have been in the possession of the same for the last twenty-four or twenty-five years past, and it is not in the power of the defendants to deliver possession of the same under any circumstances; and as to another portion of the same it is now in the possession of A. H. Winton, who obtained possession of the same by virtue of a writ of *habere facias possessionem* issued out — the said court of common pleas of Lackawanna county upon a judgment in ejectment to No. 322, November term, 1886, and the defendants are therefore unable to deliver possession thereof.

Fifth. That the only lands of which the defendants are in possession at this time they are in possession of by virtue of a legal title superior to any right, title, or claim of the plaintiffs in this case or any other person, and they have so been in possession of the
21 same for about twenty years last past, and the defendants are ready to maintain their title and right of possession to the

same by due course of law against any and all persons whomsoever challenging such their right, title, and possession.

Sixth. The application now made by the plaintiffs is a request to the court to make an arbitrary and unwarranted order and to assume a power which would be illegal and subversive of the rights of the defendants, being in direct violation of the rights guaranteed to them by the 9th and 11th sections of article I of the constitution of Pennsylvania, and by section 10 of article I of the Constitution of the United States and the 5th and 14th amendments to the same, the application being for an arbitrary order that defendants shall deliver to plaintiffs the possession of certain lands, the plaintiffs having never obtained a decree for such delivery of possession nor having ever obtained an adjudication upon the defendants' right of possession.

Seventh. Finally, we submit that the plaintiffs have not shown in their application such matters as are prerequisite to the granting such writ of assistance as that prayed for, and further that plaintiffs proceeded heretofore to the extremity of execution in this case by having an attachment issued and defendants imprisoned thereunder, from which they were discharged only upon full compliance with the decree made in this case, as appears by the record in this case; and, as further appears by the said record, it stands adjudicated that defendants have already fully complied with the decree made in this case.

Wherefore they respectfully pray that the application prayed for may be refused.

And they will ever pray, etc.

JOSEPH CHURCH.
CHARLES J. CHURCH.

22 Sworn to and subscribed before me this 18th day of July, 1887.

M. W. LOWRY, *Pro Prot'y.*

Docket Entries.

1887, July 12th. Plaintiffs move that a writ of assistance issue commanding sheriff to deliver possession of the land allotted to plaintiffs to them.

Motion to be heard July 18th, 1887, at ten a. m.; notice to be given by the defendants.

By the COURT.

1887, July 18th. Answer of defendants to application for writ of assistance filed.

1887, July 25th. By opinion of Hon. R. W. Archbald, A. L. J., filed, the writ of assistance is refused as prematurely applied for, but an order is entered on the defendants to deliver up possession, after which the plaintiffs may reapply for the writ in case delivery of possession be still refused.

1887, July 27. Defendants appeal to Supreme Court.

1887, July 30. Writ of certiorari from Supreme Court filed.

22 IV.

Opinion of Court.

It may be laid down as a general rule that a writ of assistance in equity to put the plaintiff into possession of lands will issue where delivery of such possession has been directed by the decree or where the right to such possession flows out of that which is established by the decree. The practice is by no means confined, as suggested by counsel for defendants, to proceedings for the foreclosure of a mortgage. This is but a single and more recent application of the rule. It is said by Lord Hardwicke (Penn *v.* Baltimore, 1 Ves. Sr., 444) "that the practice of putting a party into possession in a suit concerning lands within the jurisdiction of the court was first begun and settled in the reign of James I." But it is shown by others to have existed as early as the time of Henry VIII. The observation of Lord Hardwicke was called forth in the case cited by the objection made to the jurisdiction that no writ of assistance to deliver possession under the decree could issue because the lands whose boundaries were in dispute were in America. It was thus made an argument against the jurisdiction of the court that it could not give full effect to its decree in that case by the customary writ of assistance. In Dove *v.* Dove (Dickens, 617) there was a decree against the tenant in possession, the widow, that the estate of the testator be sold. After sale made the purchaser was put into possession by writ of assistance against the widow, although she claimed not under
24 the will, but under some right of jointure or dower of her own. In Huguenin *v.* Basely (15 Ves., 180), where a conveyance of land was set aside upon the ground of undue influence, the grantor was allowed a writ of assistance to put her into repossession of her property. The same practice was observed in De Vancene *v.* De Vancene (1 Edw. Ch., 272). It was said by Ch. J. Parker in Buffum's case (13 N. H., 14): "The decree in this case may be regarded as establishing an equitable title in the complainant, so that, without the execution of any deed by the defendant in pursuance of it, the court would put the plaintiff in possession by writ of assistance if necessary." In Garretson *v.* Cole (1 Harris & Johns, 387) the court said it would be a disgrace to the administration of justice if, after a title to land had been established by the adjudication of a court, there could be no way of obtaining possession but after judgment in ejectment. In Schenck *v.* Conover (13 New Jer. Eq., 223) it was considered by the chancellor as the result of all the cases to be the long-established and familiar practice of the court of chancery wherever the conveyance of real estate is decreed to compel the defendant to surrender possession to the plaintiff, and not compel him to resort to an action at law, and in our own case of Com'th *v.* Diffenbach (3 Grant, Ca., 368) a writ of assistance was awarded in accordance with the recognized equity practice, where, after judgment of ouster in *quo-warranto* proceedings, an injunction for delivery of possession had issued and obedience thereto been refused.

In Kershaw *v.* Thompson (4 Johns. Ch., 609), after a sale upon a decree for the foreclosure of a mortgage, the purchaser applied to the court to be put in possession by a writ of assistance. Chancellor Kent was at first in considerable doubt whether the practice should be extended to such a case, but, upon a careful examination of the authorities, he satisfied himself that it should be. As this is a leading case, everywhere recognized as of the highest
25 authority, and was an extension of the writ to a new class of cases, it may be well to repeat here some of the considerations which moved him. "It does not appear consistent with sound principle," says that eminent judge, "that the court which has exclusive authority to foreclose the equity of redemption of a mortgagor and can call the parties in interest before it and decree a sale of the mortgaged premises should not be able even to put the purchaser into possession against one of the very parties to the suit and who is bound by the decree. When the court has obtained lawful jurisdiction of a case and has investigated and decided upon its merits it is not sufficient for the ends of justice merely to declare the right without affording the remedy." And again: "The distribution of power among the courts would be injudicious and the administration of justice exceedingly defective and changeable, with much useless delay and expense, if it were necessary to resort in the first instance to a court of equity and afterward to a court of law to obtain a perfect foreclosure of a mortgage. It seems to be absurd to require the assistance of two distinct and separate jurisdictions for one and the same remedy, viz., the foreclosure and possession of the forfeited pledge. But this does not, upon due examination, appear to be the case, and it may be safely laid down as a general rule that the power to apply the remedy is co-extensive with the jurisdiction over the subject-matter. A bill to foreclose the equity of redemption is a suit concerning the realty and *in rem*, and the power that can dispose of the fee must control the possession. The parties to the suit are bound by the decree, their interests and rights are concluded by it, and it would be very unfit and unreasonable that the defendant, whose right and title has been passed upon and foreclosed by the decree, should be able to retain the possession in despite of the court. This is not the doctrine of the cases nor the policy of the law."

26 The practice thus established has, upon a like line of reasoning, been adopted in New Jersey (Schenck *v.* Conover, 13 New Jer. Eq., 220; Beatty *v.* De Forest, 27 N. J. Eq., 483) and perhaps other States, as well as sustained by the Supreme Court of the United States. (Terrell *v.* Allison, 21 Wal., 291.) It is said by Chief Justice Beasley in Beatty *v.* De Forest, *supra:* "In my opinion, a purchaser under a decree having a sheriff's deed has as much right to the assistance of the court to be put in possession as a plaintiff in a court of law has to an execution after judgment. * * * This remedy is founded on the general principle that a court of equity will, when it can do so justly, carry its own decrees into full execution without relying on the co-operation of any other tribunal." And by Mr. Justice Field in Terrell *v.* Allison, *supra:*

"The power to issue the writ results from the principle that the jurisdiction of the court to enforce its decree is co-extensive with its jurisdiction to determine the rights of the parties and to subject to sale the property mortgaged. It is a rule of that court to do complete justice when that is practicable, not merely by declaring the right, but by affording a remedy for its enjoyment. It does not turn the party to another forum to enforce a right which it has itself established." All this is very pertinent to the case in hand, and upon consideration of what has thus been said and decided I cannot doubt but that a writ of assistance to put the present plaintiffs into possession of their purpart would be eminently proper. It is useless to seek for analogies to this practice in the action of partition at law, for such action proceeds solely upon the theory of a common possession, and if the defendant is holding adversely a recovery cannot be had therein. No such thing therefore appears in such practice, that I am aware of, as the execution of judgment in an action of partition at law by delivery to the parties of the possession of their respective purparts. But, as I had
27 occasion to point out at a prior stage of this case, partition in equity is not necessarily subject to the same limitations as partition at law. If the court has otherwise jurisdiction to decree it, it may be no bar thereto that the defendants are holding adversely. In order, therefore, that the remedy may be complete it may be necessary in partition in equity to enforce delivery of possession according to the allotments made by the decree. The present case presents such an occasion. It is established that the defendants are trustees of the plaintiffs as to four-ninths of the land in dispute. It was upon this that the jurisdiction was taken and partition made. In execution of this trust and to completely vest the plaintiffs with their rights the defendants have been compelled to convey to them the fee. Had these proceedings resulted, as they might have, in a sale of the property, can there be a doubt, under the authorities cited, as to the power of the court to put the purchaser into possession of the premises? But though the court could so dispose of the fee, either by directing conveyances of the purparts in the one case or compelling a sale in the other, yet it is contended by the defendants that it has no jurisdiction over the possession, but must remit the plaintiffs to an action of ejectment in another forum, where it is evident they have the vain hope of litigating over again the matters that have been herein, as well as heretofore, decided against them.

I am clear, whether looking at the case as one of trust, in which the plaintiffs hold by the decree of this court a conveyance from the defendants in execution thereof, or as one of partition, proceeding upon equitable grounds, and drawing to it the power to dispose of the fee, that the right exists and should be enforced of making the decree effectual by compelling the defendants to deliver up to the plaintiffs the possession of the lands allotted to them.

But the defendants are right in the position taken in their
28 answer to the present application that no order or decree for the delivery of the possession has been served upon them. The writ of assistance only issues as the result of disobedience to

such an order (cf., Equity Rules, Rule XIV, § 82). But it is no permanent objection that this is not embodied in the decree. (Dove *v.* Dove, Dickens, 617; 1 Bro. Ch., 375; 1 Cox, 101; Kershaw *v.* Thompson, 4 Johns. Ch., 609; Montgomery *v.* Tutt, 11 Cal., 194.) The proper practice in such case seems to be to enter an order enjoining on the defendants to make delivery, and upon a refusal the writ of assistance may then issue. (Kershaw *v.* Thompson, *supra*; Montgomery *v.* Tutt, *supra*; Fackler *v.* Worth, 13 N. J. Eq., 395.) It may seem useless to make such preliminary order in the present case, in view of the declared intentions of the defendants and their attitude in opposition to the application for this writ; and it is true that some of the cases do dispense with such order. (Montgomery *v.* Middlemiss, 21 Cal., 103; Valentine *v.* Teller, Hopk., 422.) But it must be remembered that in original contemplation the principal order was the injunction to deliver possession; acting, like all process in equity, upon the person. The writ of assistance was merely an adjunct to this to compel by manual delivery of the sheriff what the defendants personally refused to concede. It may be that it is more in accordance with the modern ideas of things to at once put the plaintiff into possession of his rights, as upon an *habere facias poss.* at law, rather than to await the slow obedience of the defendant, but I do not feel authorized to so modify the established practice. Moreover, it may be said, that until the defendant has been served with such an order he cannot know that he is in fact required to deliver up possession, and that the mere demand of his adversary is not the equivalent. *Non constat*, that he will not obey rather than contemn such order, if it be made, especially as it may also be enforced against him by attachment.

With regard to the suggestion made by the defendants
29 in the present answer that the lands in question are in part in the possession of John Keithline and A. H. Winton, a reference to the map made by the commissioners shows that the Keithline or Keisling lot was set off as part of the lands allotted to the defendants. But, however that may be, the defendants cannot set up the claims of third parties as a shelter for themselves.

While, therefore, I am satisfied, according to the views above expressed, that a writ of assistance may properly issue in this case if it becomes necessary, I refuse it for the present as prematurely applied for; but I will enter an order on the defendants to deliver up possession, after which the plaintiffs may reapply for the writ in case delivery of possession be still refused.

R. W. ARCHBALD,
Add. Law Judge.

July 25th, 1887.

V.

Order.

And now, to wit, July 25th, 1887, it is ordered that the said Joseph Church and Charles J. Church, the defendants in this case, on being served with a certified copy of this order, forthwith deliver up

to the said Helen M. Kelsey and others, the plaintiffs in this case, their agent or attorney, the lands and premises allotted unto the said plaintiffs by the partition made and decreed in this case, the same as mentioned and described in the report of the commissioners herein and in the deed from the said defendants to the said plaintiffs executed in pursuance of said decree; and upon due proof of service of this order and the refusal of said defendants to comply therewith by delivery of the possession of said lands and premises the said plaintiffs may apply for a writ of assistance according to the course and practice of the court in such cases.

R. W. ARCHBALD,
Add. Law Judge.

VI.

Assignment of Error.

It is respectfully submitted that the court erred in making the order of July 25th, 1887, commanding Joseph Church and Charles J. Church to deliver up to Helen M. Kelsey and others the lands in their possession, held and claimed by them by virtue of a complete legal title against which there had been no legal adjudication, as well as other lands which were not in their possession and which they could not deliver.

Docket Entries.

In the Supreme Court of Pennsylvania in and for the Eastern District. July Term, 1887. No. 206.

Appeal of Joseph Church and Charles J. Church, minor son and heir of Charlotte Church, deceased, to No. 5, January term, 1883, in equity, wherein Helen M. Kelsey, Cyrenius Wise, and Ann Wise, his wife, in right of said Ann; Sidney Philip Stevens, Letta Ann Ruland; L. T. Brown and Rozelle, his wife, late Rozelle Stevens, in right of said Rozelle; F. E. Medway and Jennie, his wife, in right of said Jennie; Lillie Stevens, Zelda Stevens, Caleb E. Wright, Samuel Linn, Isaac P. Hand, Henry W. Palmer, C. F. Williams, Elisha Griffin, and J. McKiel Stevens are plaintiffs and said appellants are defendants.

Surwrit of certiorari to the court of common pleas for the county of Lackawanna, No. 5, January term, 1883. Ret'ble the third Monday of February, 1888. Exit July 28, 1887. February 21, 1888, record returned and filed. *Eo die*, assignments of error filed; February 22, 1888, argued. April 30, 1888, appeal dismissed and decree affirmed at costs of appellant, *per curiam*. March 19th, 1889, remittitur exit and with record sent to W. H. Jessups, Esqr.

I hereby certify that the above and foregoing is a true copy of the docket entries in the above-entitled case.

Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.

In testimony whereof I have hereunto set my hand and the seal of said court, at Philadelphia, this 18th day of October, 1889.

CHAS. S. GREENE,
Prothonotary.

[Endorsed :] No. —. January term, 188–. Supreme court. Costs: Tax and writ, $—; prothonotary, —; attorney, —; amount, $—.

32 In the Supreme Court of Pennsylvania for the Eastern District.

JOSEPH CHURCH and CHARLES J. CHURCH, Minor Son and Heir of Charlotte Church, Deceased, Appellants,
and
HELEN M. KELSEY, CYRENIUS WISE, and Ann Wise, His Wife, in Right of said Ann; Sidney Philip Stevens, Letta Ann Ruland; L. T. Brown and Rozelle, His Wife, Late Rozelle Stevens, in Right of said Rozelle; F. E. Medway and Jennie, His Wife, in Right of said Jennie; Lillie Stevens, Zelda Stevens, Caleb E. Wright, Samuel Linn, Isaac P. Hands, Henry W. Palmer, C. F. Williams, Elisha Griffin, and J. McKiel Stevens, Appellee-.

Surwrit of — to the Court — for the County of —, of — Term, 18—. No. —.

Issue writ of certiorari to the court of common pleas for the county of Lackawanna, sitting in equity, to remove record and proceedings in a certain action in said court, No. 5, January term, 1883, in which the said appellees are plaintiffs and the said appellants are defendants.

Returnable to next term, *sec. reg.*

A. RICKETTS,
Of Wilkesbarre, Pa.,
A. H. WINTON,
Of Scranton, Pa., Att'ys for Appellants.

To Charles S. Greene, proth'y sup. c't.

COUNTY OF LACKAWANNA, *ss:*

Joseph Church, being duly sworn, saith the writ of certiorari applied for and purchased in above-entitled case is not intended for delay.

JOSEPH CHURCH.

Sworn and subscribed this 27th day of July, A. D. 1887.

THOS. H. DALE, *Proth'y,*
Per BUTLER.

I hereby certify that the above is a true and correct copy of the præcipe filed in the above-entitled case.

In testimony whereof I have hereunto set my hand and the seal of said court, at Philadelphia, this 18th day of October, A. D. 1889.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

CHAS. S. GREENE,
Prothonotary.

33 In the Supreme Court of Pennsylvania for the Eastern District.

JOSEPH CHURCH and CHARLES J. Church, Minor Son and Heir of Charlotte Church, Deceased, *vs.* HELEN M. KELSEY *et al.* } Surwrit of Certiorari to the Court of Common Pleas for the County of Lackawanna, Sitting in Equity, of January Term, 1883. No. 5.

We, Joseph Church, Charles J. Church, W. M. Finn, severally acknowledge to owe the above-named appellees the sum of three hundred dollars, upon condition that the above-named appellants prosecute their writ of certiorari with effect; and, if the judgment or order be affirmed or the writ of certiorari be discontinued or non-prossed, that appellants pay the debt, damages, and costs adjudged or accruing upon such writ and all other damages and costs that may be awarded upon such writ of certiorari, and for the return to the court below of the record with the remittitur, or else we will do it for them.

JOSEPH CHURCH.
CHARLES J. CHURCH.
W. M. FINN.

Taken and acknowledged this 27th day of July, A. D. 1887.

THOS. H. DALE, *Proth'y,*
Per BUTLER.

I hereby certify that the above is a true and correct copy of the bond filed in the above-entitled case.

In testimony whereof I have hereunto set my hand and the seal of said court, at Philadelphia, this 18th day of October, A. D. 1889.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

CHAS. S. GREENE,
Prothonotary.

34 Supreme Court of Pensylvania, Eastern District.

Church's appeal from the decree of the court of common pleas of the county of Lackawanna; argued February 21st, 1888; filed April 30th, 1888.

Per curiam:

If it be at all necessary to prove so obvious a proposition as that a court of equity has the power to enforce its own decrees, that proof may be found in the able opinion of the learned judge of the court below. The appeal is dismissed and the decree affirmed, at costs of appellant.

STATE OF PENNSYLVANIA, *Eastern District,* } *ss:*

Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.

I do hereby certify that the above and foregoing is a full, true, and accurate copy of the opinion delivered in the above-entitled cause in the supreme court of Pennsylvania, eastern district, and filed in the office of the phothonotary of said court.

In testimony whereof witness my hand and the seal of said court this 18th day of October, A. D. 1889.

CHAS. S. GREENE,
Prothonotary.

35 UNITED STATES OF AMERICA, *State of Pennsylvania,* } *ss:*

I, Charles S. Greene, prothonotary of the supreme court of Pennsylvania, eastern district, do hereby certify that the foregoing record, pages 1 to —, inclusive, is a true and faithful copy of the record and proceedings of the supreme court of the State of Pennsylvania, eastern district, in a certain suit therein pending, wherein Joseph Church *et al.* were appellants and Helen M. Kelsey *et al.* appellees.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said supreme court of the State of Pennsylvania, eastern district, at Philadelphia, the 19th day of October, 1889, and in the one hundred and fourteenth year of the Independence of the United States.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

CHAS. S. GREENE,
Prothonotary of the Supreme Court of Pennsylvania, Eastern Dist.

36 (Copy.)

EASTERN DISTRICT OF PENNSYLVANIA, *set:*

The Commonwealth of Pennsylvania to the justices of the common pleas court for the county of Lackawanna, Greeting:

Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.

Whereas, by virtue of our writ of certiorari from our supreme court of Pennsylvania for the eastern district, returnable in the same court on the third Monday of February, in the year of our Lord one thousand eight hundred and eighty-eight, a record was brought into the same court, upon appeal by Joseph Church and Charles J. Church, minor son and heir of Charlotte Church, deceased, from your decree made in the matter of — to No. 5, January term, 1883, in equity, wherein Helen M. Kelsey, Cyrenius Wise, and Ann Wise, his wife, in right of said Ann; Sidney Philip Stevens, Letta Ann Ruland; L. T. Brown and Rozelle, his wife, late Rozelle Stevens, in right of said Rozelle; F. E. Medway and Jennie, his wife, in

right of said Jennie; Lillie Stevens, Zelda Stevens, Caleb E. Wright, Samuel Linn, Isaac P. Hand, Henry W. Palmer, C. F. Williams, Elisha Griffin, and J. McKiel Stevens were plaintiffs and said appellants were defendants, and it was so proceeded in our said supreme court that the following decree was made, to wit, appeal dismissed and decree affirmed at costs of appellant-, and the record and proceedings thereupon and all things concerning the same were (agreeably to the directions of the act of Assembly in such cases made and provided) ordered by the said supreme court to be remitted to the court of common pleas for the county of Lackawanna aforesaid, as well for execution or otherwise as to justice shall appertain: Wherefore we here remit you the record of the decree aforesaid and the proceedings thereupon in order for execution or otherwise, as aforesaid.

Witness the Honorable Isaac G. Gordon, doctor of laws, chief justice of our said supreme court, at Philadelphia, the 23rd day of May, in the year of our Lord one thousand eight hundred and eighty-eight.

CHAS. S. GREENE,
Prothonotary.

37 [Endorsed:] 5. Jan. T., '83. In equity. No. 2, of July term, 1887. Supreme court. In the matter of the appeal of Joseph Church and Charles J. Church. Remittitur. Att'y, 3.00; pro., 7.25; rem., 75. Henry W. Palmer.

I certify that the within and foregoing is a true and correct copy of the remittitur in the above case.

In testimony whereof I have hereunto set my hand and the seal of said court, at Philadelphia, this 18th day of October, A. D. 1889.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

CHAS. S. GREENE,
Prothonotary.

38 In the Supreme Court of the United States.

JOSEPH CHURCH *et al.*, Pl'ffs in Error,
v.
HELEN M. KELSEY *et al.*, Defendants in Error. } Assignments of Error.

It is respectfully submitted that the learned court below, the supreme court of the State of Pennsylvania, erred in the following particulars, to wit:

1. In ruling that the county court sitting in equity had jurisdiction in partition to make an order requiring the plaintiffs in error to deliver over to the defendants in error the possession of lands held by them adversely by a legal title purchased *bona fide* for value without notice of the claim of defendants in error, and held in the adverse, exclusive possession of plaintiffs in error for many years under such legal title.

2. In ruling that the county court sitting in equity could lawfully make such order for the delivery of possession of the lands to the

defendants in error by the plaintiffs in error, although the lands were held adversely and exclusively by them by virtue of a *bona fide* purchase of the legal title thereto, and although their right to hold the possession of the same had never been tried by a jury in a regular common-law proceeding, and although such trial by jury is the only due process of the law known in Pennsylvania for the trial of such a right.

39 3. In ruling that such order for the delivery of possession of lands could lawfully be made by a judge in Pennsylvania sitting in equity without a bill filed stating a case requiring such action of the court or containing a prayer for any such order or decree or anything in the pleadings warranting such action on the part of the court.

4. In ruling that after the decree entered in the cause had been fully complied with in obedience to the process of the court to compel compliance with such decree the court could of its motion again take up the cause and without any additional pleading or prayer therefor make a new additional decree not warranted by any pleading or process before the court.

Respectfully submitted,

A. RICKETTS,
Counsel for Pl'ff in Error.

Endorsed on cover: Pennsylvania supreme court. No. 1453. Joseph Church and Charles J. Church, plaintiffs in error, *vs.* Helen M. Kelsey, Cyrennes Wise, and Ann Wise, his wife; Sidney Philip Stevens, Letty Ann Ruland, *et al.* Filed October 21, 1889.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889,
No. 1453.

JOSEPH CHURCH and CHARLES J. CHURCH,

Plaintiffs in Error.

vs.

HELEN M. KELSEY, CYREMUS WISE and ANN WISE, his wife, SIDNEY PHILIP STEVENS, LETTY ANN RULAND, L. T. BROWN and ROZELLE, his wife, *et al*,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

A. RICKETTS,
Counsel for Plaintiff in Error.

LAMBERT PRINT, 104 PUBLIC SQUARE.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889,
No. 1453.

JOSEPH CHURCH and CHARLES J. CHURCH,
Plaintiffs in Error.

vs.

HELEN M. KELSEY, CYREMUS WISE and ANN WISE, his wife, in right of said wife, SIDNEY PHILIP STEVENS, LETTY ANN RULAND, L. T. BROWN and ROZELLE, his wife, late ROZELLE STEVENS, in right of said ROZELLE, F. E. MEDWAY, and JENNIE, his wife, in right of said wife, ZELDA STEVENS, CALEB E. WRIGHT, SAMUEL LINN, ISAAC P. HAND, HENRY W. PALMER, C. F. WILLIAMS, ELISHA GRIFFIN and J. MCKIEL STEVENS,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

Upon motion to dismiss writ of error, for want of jurisdiction, because there is no Federal question involved in said cause; or if the writ of error shall not be dismissed,

that the decree of the Supreme Court of the State of Pennsylvania be affirmed, on the ground that although in the opinion of this Court the record may show that this Court has jurisdiction, it is manifest that said writ of error was taken for delay only, and that the question on which the jurisdiction depends is so frivolous as not to need further argument.

STATEMENT OF CASE, AND BRIEF OF ARGUMENT, AGAINST THE MOTION, ON PART OF PLAINTIFFS ERROR.

Joseph Church was a citizen of the State of Wisconsin. He had married Charlotte Stevens, the niece and foster-daughter of one Letta Griffin, of Pennsylvania. Eight or ten days after the birth of said Charlotte, her mother died, and on her death-bed committed her infant to the care of her sister Letta, who assumed the same, and reared the child to womanhood, so that the relation between Charlotte and her aunt Letta was practically that of mother and daughter.

The land in question in this case, was devised to Letta Griffin by her father, and after his death she entered into the full and unquestioned possession of it, and exercised over it all the rights of absolute ownership. She conveyed lots, reserved to herself the coal and minerals, settled land damages, and conveyed rights of way, without any one questioning her right so to do, although her nephews and nieces,—who after her death set up the claim which caused the present litigation, and who now themselves in part, and their assigns in part, are the present defendants in error,—lived all around her and knew of her thus treating the property. Among other conveyances was one of a lot to a Mrs. Louisa Marsh one of the very Stevens heirs, the litigants in this case. At one time she convey-

ed away the whole of the property except a one-half acre; the purchaser failing to pay, she was compelled to proceed on the bond and mortgage given, and recover the land. During all these transactions, and during all the life of Letta, no one objected, nor claimed that she had not a perfect right so to deal with the property as her own, and dispose of it as she pleased.

The land was unproductive, and Letta Griffin became involved in debts which began to harass her. She therefore applied to Joseph Church to leave his home and business in Wisconsin and come to Pennsylvania and take this property off her hands, she proposing to sell it to him in consideration of his paying off her debts, taking care of her during her life, and after her death burying her respectably, and paying the several legacies she had given in her will to her nephews and nieces known as the Stevens children. Upon examination of these matters, Church assented to the proposition, and purchased the property. He paid her debts and took care of her during her life, and after her death properly buried her, and offered to pay the legacies in her will to the Stevens children. They refused to receive them, and then for the first time informed Church that they claimed that Letta Griffin was their trustee for one-half the lands.

Church after taking possession of the property expended altogether in improving it about thirty thousand dollars, part before and part after Letta Griffin's death.

The Stevens heirs brought ejectments to enforce their claims. Subsequently they filed a bill in equity for the same purpose, and to have Charlotte Church, as devisee of Letta Griffin, charged with a trust in their favor, alleging that Letta Griffin had promised her father that she would devise half the land he devised to her, to them, and that she had obtained the devise to herself upon this promise. After they had filed their bill in equity, Church set their ejectments down for trial, whereupon they took

non-suits in the several cases. They obtained a decree in the equity proceeding, declaring Charlotte Church as a devisee under the will of Letta Griffin, a trustee as to four-ninths of the property for them, and requiring her to make to them a conveyance according to their several interests in the said four-ninths. She died just after the decree was served upon her without having executed any conveyance, whereupon the suit abated, and no action was ever taken to revive it, nor was any further proceeding of any kind taken therein.

The present defendants in error, subsequently filed a bill in equity for partition against plaintiffs in error, alleging themselves to be *tenants in common in fee*, of the lands in question, and praying a decree in partition.

Plaintiffs in error filed their answer denying the alleged tenancy in common, and claiming among other things, that they were in the exclusive, adverse possession of the lands in question, and had so been for many years, holding by virtue of a legal title purchased *bona fide* for value, without notice of the claim upon which appellees based their bill. That they had so purchased, and so held the lands, was fully proved. Thereupon they claimed that the case was not one within the jurisdiction in partition. The learned Judge admitted that at law that position would be insurmountable, but ruled that that very fact only furnished "occasion for assuming jurisdiction" in equity, "for the very purpose of overcoming" these legal obstacles. In this he overlooked the fact that courts of equity in Pennsylvania have only such equity powers as are conferred by the Legislature, and cannot "*assume*" jurisdiction in any matter, for any purpose, no matter how well intentioned. He also overlooked the fact that the act conferring jurisdiction upon courts sitting in equity in partition, in no wise enlarged the boundaries of the action of partition, but simply gave them jurisdiction in *partition* as that action was known and existed under our

laws; and that it by no means conferred upon courts sitting in equity, jurisdiction in ejectment, and could not do so under the Constitution.

Under this ruling a decree was entered in favor of defendants in error, awarding to them four-ninths of the land thus in possession of plaintiffs in error, and ordering a "deed in fee simple" to be made to defendants in error.

An attachment against plaintiffs in error was obtained, to compel obedience to this decree. Under duress of this, they complied with the decree, protesting that their constitutional rights were violated, and giving notice that they should regularly and legally contest the validity of the conveyance and the whole proceeding. Upon their submission, the Court entered an order of record stating that they had complied with the decree, and were therefore discharged from the attachment. Thus that case was fully ended.

But inasmuch as partition is not an action for recovery of lands adversely held, and can only lie where there is a common possession, the parties of course remained in *statu quo* as to the possession, and so plaintiffs in error remained in the adverse, exclusive possession of the land just as they had all along been. And they distinctly informed defendants in error that they should so remain until they were turned out by "due process of law" according to "the law of the land." Defendants in error having been so successful in obtaining their decree, by getting equity to surmount the "insurmountable" obstacles of the law, concluded after some delay to try a further peculiar experiment. They made an application to the Judge at chambers, entitling it in this partition case, for a writ of assistance commanding the Sheriff to put plaintiffs in error out of possession of the lands and to put defendants in error in possession. The motion was entertained, and upon notice plaintiffs in error resisted it, filing their answer, showing that no decree or order

for delivery of possession had ever been served upon them; that no such decree or order was ever made in the case, nor could have properly been made, it being simply a proceeding in partition; and also that the case was fully ended, the defendants in error having proceeded to the extremity of execution and imprisoned the plaintiffs in error, from which they were discharged only upon full compliance with the decree, and that the record showed that they had fully complied with the decree which had been made in the case. And they also showed that part of the land was not in their possession, but in the possession of other parties; and that what was in their possession was held by a legal title superior to any claim of plaintiffs in error; and that the application was for an order which would be in direct violation of the rights guaranteed to them by both the State and Federal Constitutions.

After hearing, the learned Judge refused the writ of assistance as prematurely applied for; but entered an order upon plaintiffs in error, that they should deliver possession, and stating, that in case of non-compliance with the order, then defendants in error might apply for a writ of assistance.

It will be observed that the application of the defendants in error was not for such an order as that entered by the learned Judge, but simply for a writ of assistance; and that the order was entered purely of the Judge's own motion. Also, that the only hearing which plaintiffs in error ever had, was upon the application of defendants in error; and that the order complained of was entered upon them without any hearing having been allowed them as to the propriety of it.

It is also to be observed, that plaintiffs in error in no wise dispute or question, the power of the Court sitting in Equity, to order the delivery of possession of land, and to enforce it by writ of assistance, wherever such transfer

of possession is involved in a question or proceeding over which the Court has jurisdiction, and it has been legitimately decreed.

What they contend, is, that the order the subject of the writ of error in this case, is not within the power and jurisdiction of the Court. The plaintiffs in error were in the exclusive, adverse possession of the land in question, and had so been for many years, having obtained the same by the purchase of the legal title, *bona fide*, for a valuable consideration, without notice of any kind, of the trust claimed by the defendants in error. The whole claim of the defendants in error, is based upon the fact that they obtained a decree in a former Equity proceeding, declaring that one Letta Griffin was a trustee for them, and that Charlotte Church as a devisee under the will of said Letta Griffin was bound by that trust. All this may be conceded to be not only established, but true in every particular, and yet, if in a regular trial at law, a jury should find that the claim of plaintiffs in error is also true, to wit, that they purchased the land from Letta Griffin, in her life time, *bona fide*, for a valuable consideration, and without notice in any way of the said trust, they would of course be entitled to hold the land against the defendants in error by virtue of their superior legal right and title.

And the contention of plaintiffs in error further is, that thus holding the title and possession, they have a right, guaranteed to them, both by the State and Federal Constitutions, to have their claim tried by a jury in a common law proceeding; and that the Legislature not only could not, but never has attempted to, confer upon the Court sitting in Equity the power and jurisdiction to deprive them of this right; and therefore, the order, the subject of this writ of error, is clearly illegal, unwarranted, and a violation of their constitutional rights.

It will at once be seen by a reference to *Church v. Kelsey, 121, U. S., 282*, that the questien decided by this

Court, when this case was here on a former writ of error, was totally different from the one now presented.

And we further submit, that by reference to the same case it clearly appears, that defendants in error are fully notified that this Court has jurisdiction of this case, and that they have no color of right to a dismissal. The language of the opinion is, "It sufficiently appears from the record that the first of these questions was actually presented to and decided by the Court below, adversely to the claim of the plaintiffs in error. That is sufficient to give us jurisdiction."

In the present case, this more clearly appears, for when application was made for a writ of assistance in this case, the very ground of defense made against it by plaintiffs in error, was, that it was an application for "an arbitrary and unwarranted order, and to assume a power which would be illegal and subversive of, the rights" of plaintiffs in error, because in violation of not only the provisions of the Constitution of Pennsylvania, but of the United States, especially the 5th and 14th Amendments to the same; as will be seen by reference to the record as printed, page 12, the sixth paragraph of the answer of plaintiffs in error. The learned Judge refused the writ of assistance but made a new order in the case, so that such writ could again be asked.

And this, to wit, that the order directing plaintiffs in error to deliver the possession of their land to defendants in error, was an arbitrary and illegal order, because it was not that due process of law which was guaranteed by the State and Federal Constitutions, and was especially an express violation of the 5th and and 14th Amendments to the Federal Constitution, was the particular and especial defence of the plaintiffs in error, not only in the original County Court, but upon appeal in the Supreme

Court. Because the County Court chose to overrule this defence by ignoring it, was their reason for appealing to the Supreme Court of the State; and because the Supreme Court chose to likewise overrule it by a similar ignoring process, is their reason for purchasing a writ of error from this Court. In view of the facts of this case, it is difficult to understand some of the language of the brief presented by the learned counsel for defendants in error upon this motion. For instance, upon page 3 thereof, it says in reference to our appeal to the Supreme Court of the State, "no exception was taken in the lower Court." It is certainly known to the counsel, that in Pennsylvania, in equity proceedings, bills of exception are never taken; and that the appeal itself was an exception.

It is also certainly known to the counsel, that under the forms of pleading in Pennsylvania in Equity proceedings, the assignment of error, which he quotes, was the precise and appropriate form for bringing before the Supreme Court of that State, the whole defence presented in the answer in the Court below. Had there been any defect in this respect, advantage would undoubtedly have been taken there of such defect, and the fact that no such claim was presented in that Supreme Court, is the best evidence that no such defect existed. The counsel moreover is fully aware, that the unconstitutionality of the order and proceeding in the Court below, was the especial matter presented to the Supreme Court. It is true that the Supreme Court brushed it all aside with the simple remark, that "a Court of Equity has the power to enforce its own decrees."

Whether that was a proper and adequate disposition of the questions presented before that Court, is the very matter for this Court to decide, upon this writ of error. At the proper time, we will respectfully submit, that the power of a Court in Equity to enforce its own decrees was not a question before the Court at all. We raised no

such question. The record—pp. 10–12 inclusive,—shows that the decree which had been entered in the partition suit had been fully complied with, and there was therefore no question as to the execution of that decree before the Court; but the matters now complained of, were matters erroneously forced in by way of addition to that case after it had been fully completed and ended. It is true defendants in error presented a petition for a writ of assistance, but that was refused, as not warranted by the record. But to fix up the record so that such writ could be applied for, the learned Judge of his own motion, attempted to ingraft into the record a new order, in the nature of an additional decree. This order is printed at pp. 16, 17, of the record, and also is printed on p. 2 of brief of counsel for defendants in error. It was from this order that an appeal was at once taken to the Supreme Court of the State; and a single glance at it, shows, that the question before that Court was not one of the *execution* or *enforcement* of a decree, but the power of a Court, after its decree in a case had been fully complied with, and the defendants therein discharged from execution process because of their full compliance with the decree, and the case thus completely ended,—the power of the Court to again take up the case, and even without a direct application therefor, to ingraft a new decree upon the case, to be be made the basis of other proceedings; such new decree not being germane to the case presented in the bill, nor warranted by any pleadings or prayer in the case.

But at the present we submit, that the jurisdiction having thus already been declared by this Court, and there being therefore no color of right to a dismissal, the motion to affirm cannot be entertained. As we understand it, upon this point the practice of the Court is fully settled. In *Whitney v. Cook, 99 U. S., 607*, the language of the Court is,

"This is a motion to affirm only. Our amended Rule "6 allows a motion to affirm to be united with a motion "with a motion to dismiss. This implies that there shall "appear on the record at least some color of right to a "dismissal. That is not pretended in this case. *We are*, "*therefore, compelled to deny this motion.*"

In *Ackely v. Hall, 106 U. S., 428*, the Court says, "There is "not in this case such a color of right to a dismissal as to make it proper for us to consider the motion to affirm. "*Whitney v. Cook, 99 U. S., 607.*"

Then again in *Davies v. Corbin, 113 U. S., 687*, the Court declares, "The original rule allowing a motion to affirm "to be united with a motion to dismiss was promulgated "May 8, 1876, 91 U. S., VII., and in *Whitney v. Cook, 99* "*U. S., 607*, decided during the October Term, 1878, it was "ruled that the motion to affirm could not be entertained, "unless there appeared on the record at least some color "of right to a dismissal. This practice has been steadily "adhered to ever since, and, in our opinion, prevents our "entertaining the motion to affirm in this case. *That* "*motion is consequently denied.*"

And in *Gaines v. Corbin, id.*, "*These motions are denied.* "There is not sufficient color of right to a dismissal, to "make it proper for us to entertain a motion to affirm."

In view of this clear ruling of the Court, we suppose it is not necessary to go into a full elaboration of the case upon its merits, at this time. But in addition to what has already been presented, it may be proper to call attention to the facts, that in their first answer to the petition out of which the alleged illegal proceedings grew, the plaintiffs in error plainly set forth, not only their position as holders of the superior title to the land, and their constitutional rights as such holders, and to the want of jurisdiction in the Court to proceed as prayed in the petition; but also to the fact, that even if the matter were ordinarily within the jurisdiction, there was in this case, no such

bill, or pleading of any kind, pending before the Court, as would warrant the granting the prayer of the petitioners. The plaintiffs in error were in the open, notorious, adverse possession of the land in question, and had been for about twenty years, as they set forth in their answer. They had purchased the legal title, *bona fide*, for value, without notice of any kind, of any trust or incumbrance in any wise affecting the title. Under such circumstances, in Pennsylvania, the only "due process of law," by which they could be deprived of their title and possession, would be an action of ejectment at law; and it would require two verdicts and judgments in ejectment to finally deprive them of their right. That such is the law of Pennsylvania, has been repeatedly declared by the Supreme Court of that State.

In *Meek's Appeal, 97 St. R., 313*, that Court in reversing the Court below and dismissing a bill filed to remove a cloud upon the title, says, "the defendants having entered into possession under such an agreement without "either fraud, accident or mistake, have at least the right "to have their case passed upon by a jury in a common "law proceeding."

The language of Strong, J., afterwards a justice of this Court, in delivering the opinion of the Court in *North Pa. Coal Co. v. Snowden, 42 St. R., 488, 491-2*, is such that we can do no better than quote it as part of our argument, to wit:

"But if there is any right to which, more than all "others, the people of Pennsylvania have clung with unrelaxing grasp, it is that of trial by jury. They brought "it with them from the land of their forefathers. In "every constitution which has been adopted, they have "taken care to secure it against infringement, and put it "beyond the power of either the executive, the legislative, or the courts to take it away from any individual. 'In that of 1776, the 11th section of the Declaration of

"Rights was, 'That in controversies respecting property "and in suits between man and man, the parties have a "right to trial by jury,' which ought to be held sacred, "and the plan or frame of government, while giving to "the Supreme Court and the several Courts of Common "Pleas the powers of a Court of Chancery as to perpetu- "ating testimony, obtaining evidence, and the care of "lunatics, and such other powers as future Assemblies "might give not inconsiatent with that constitution, "added immediately, 'Trial by jury shall be as hereto- "fore." The Constitution of 1790, and the amended one "of 1838 contain substantially the same provisions, "though, if possible, more emphatically stated. Their "language is, 'Trial by jury shall be as heretofore, and "the right thereof remain inviolate.' What can this "mean, but that the right to have controverted questions "of fact in common law cases decided by a jury, should "be beyond the reach of any department, whether it be "the Legislature, the Executive, or the Judiciary? This "was the right which had always been enjoyed before, "and if the constitutional provisions were not intended "to protect that in all its length and breadth, they can "mean nothing."

"It is true, the Legislature are authorized to vest in "the courts such powers (beyond those enumerated), to "grant relief *in equity*, as shall be found necessary, (art. "5, sec. 6), but this must be understood as referring to "powers in equity cases, in that class of cases of which "Chancery had jurisdiction. Such an understanding is "necessary to make the different parts of the constitution "consistent with each other and to give effect to all. It "cannot mean that the Legislature may confer upon the "Supreme Court and the Courts of Common Pleas, the "power of trying according to the course of chancery, any "question which has always been triable according to the "course of law by a jury. If it can, then an ejectment

"founded solely on a legal title, an action of debt on a "bond, or a replevin, or an action of trespass, may be sent "into chancery, all contested facts in it be decided by the "Judge, and the intervention of a jury be unknown."

"Then what has become of the constitutional right of "the citizen? Such a doctrine would startle the people "of this Commonwealth, and justly, for it would deprive "them of one of their most valued privileges. No power "in our government can take from the litigant the "right to have his case tried by a jury, substantially in "the mode and with the same effect as that which belong-"ed to jury trials in similar cases, when the Constitution "of 1776, was adopted. What is law and what is equity "is a judicial question. It belongs, therefore, exclusively "to the judiciary. But were it admitted that the Legisla-"ture could authoritatively convert a legal right into an "equitable one, a Court of Equity could not, as such, en-"force it. The judiciary, no more than the Legislature, "can deny to any litigant the right of trial by jury, in a "case appropriate to such a mode of trial."

This decision has never been questioned nor shaken; on the contrary it has been repeatedly in the fullest manner approved and confirmed. *Norris' Appeal, 64 St. R., 275; Tillmes v. Marsh, 67 id., 507; Haines' Appeal, 73 id., 169.*

In view of this clear, explicit declaration of the law, how can the order in this case possibly be defended?

Again, it has been expressly declared by the same Court, that in such case as that of plaintiffs in error, to wit, that of parties holding lands adversely, there is no jurisdiction in partition. Even between actual tenants in common, an adverse holding by one, for any length of time, however short, will bar a recovery in partition; for ejectment and not partition, is the proper remedy against a person holding adversely.

Law and Patterson, 1 W. & S., 184, 153.
McMasters v. Carothers, 1 State Rep., 324.

By Act of Assembly, Courts sitting in Equity have jurisdiction "in partition" conferred upon them. But it is only in cases "in partition" that such jurisdiction is conferred.

The Act in no wise enlarged the boundaries of the action of partition; it simply gave jurisdiction in *partition*, just as that action was known and used theretofore. If the Act had given jurisdiction such as is claimed here, to wit, the right to try the adverse title of plaintiffs in error and to turn them out of their adverse possession without the assistance of a jury, it would have been clearly unconstitutional; for it would plainly have authorized the denial to plaintiffs in error of the right of trial by jury in a case always held and known to be appropriate to such a mode of trial, and this as stated in the language of Judge Strong above quoted, no power in our State government can lawfully do.

It is evident that the learned Judge who made the order in this case, fell into the error of not distinguishing between the powers and jurisdiction of the Court of Chancery in England, and of such of the Courts of the United States as possess general equity jurisdiction, and the limited jurisdiction conferred upon the Courts sitting in Equity in this State. It will be observed that in looking for authority for his action he has decidedly gone abroad and roamed at large, instead of keeping wisely at home. For it may be taken for granted that the Courts of the other States which the learned Judge has cited, have full authority and power for their action thus cited, yet that is of no significance in a question as to the authority and power of our Courts sitting in Equity. Nothing is more clear and certain, than that the only authority to which we can look in Pennsylvania for the action of the Courts sitting in Equity, is that conferred by the Acts of Assembly. *Dohnert's Appeal, 64 St. R., 311*, is a case

very clearly showing this principle, and also showing the limited character of the equity jurisdiction of our Courts. There it is shown, that while the Legislature has conferred the power and jurisdiction in equity to entertain and determine bills of interpteader, it has not conferred such power over biils in the nature of bills of interpleader, which are just as much matters of equity jurisdiction in Courts possessing general equity jurisdiction.

The character of the jurisdiction of our Courts sitting in Equity as a limited one, and that to exercise a jurisdiction not granted by the Legislature would be a usurpation, has been repeatedly declared.

Davis v. Gerhard, 5 Wh., 466.

Gilder v. Merwin, 6 Wh., 522.

Page v. Heath, 56 St. R., 215.

In *Bakewell & Kerr v. Keller, 11 W. N. C., 300*, this matter of the difference between the jurisdiction of Courts sitting in Equity in Pennsylvania, and that of Courts possessing general equity jurisdiction, is fully discussed, and the bill was dismissed because of our limited jurisdiction, although the Court declared there was no doubt that such a bill would be sustained in Courts possessing general equity jurisdiction.

This error of the learned Judge appears clearly in his language concerning the power of the Court to issue the present order; according to his doctrine, wherever a party claims a portion of the land held and claimed adversely by another, there the Court sitting in Equity, may under the guise of a bill in equity for partition try and determine such adverse title, and oust such adverse possession by a writ of assistance. That is, the Court sitting in Equity has jurisdiction in ejectment pure and simple.

But the law is directly and expressly to the contrary, as plainly appears in the cases above cited. In such case, the Court sitting in Equity has no jurisdiction.

In the second place, this order was unwarranted, even if in a proper proceeding there had been jurisdiction. The opening sentence of the brief of defendants in error upon this motion is, "The original suit was a bill in equity for a partition of land held in common." And it will be observed, that in order to present a case in partition, defendants in error in their bill stated themselves to be "tenants in common in fee" with defendants in error, thus alleging in themselves a unity of possession with defendants in error; and there is not a shadow of a prayer for anything like a decree for delivery of possession to them, nor anything like an intimation that plaintiffs in error were in the adverse possession of the land. Had they so stated, they would according to the principles above discussed, have stated themselves out of Court. According to the simplest principles of pleading and practice, under the bill and prayer there cannot regularly be entered such a decree or order as that now in question. In *Del. & Hud. Canal Co. 21 St. R., 131*, the rule is thus stated, speaking of the relief to be granted under the prayer for general relief, to wit, "The relief to be granted under this "prayer must not only be consistent with the specific re- "lief demanded, but must be sustained by the case made "by the bill; and the allegations relied upon must not "only be such as to afford a ground for the relief sought, "but they must appear to have been introduced into the "bill for the purpose, and not for the purpose of corrobo- "rating the plaintiffs' right to the specific relief prayed; "otherwise the Court would take the defendant by sur- "prise, which is contrary to its principles." And the same doctrine is declared again in *Kelsey v. Murphy, 26 St. R., 78, 82*, and in *Cumb'r Valley R. R. Co's Appeal, 62 St. R., 218, 230*. And this is but stating the rule of pleading and practice everywhere adopted, that the bill must fully state the case of complainant, the prayer must conform to the case stated in the bill, and the decree must likewise

conform to the prayer and the allegations of the bill. *Dan. Ch., Pl. & Pr., 2d Am. Ed., p. 377 and 438; Montesquieu v. Sandys, 18 Ves. Jr., 302; Stevens v. Guffy, 3 Russ., 185; Crocket v. Lee, 7 Wheaton, 523*, where the Court says, "The rule that the decree must conform to the allegations "as well as to the proofs of the parties, is not only one "which justice requires, but one which necessity imposes "on Courts." In *Jackson v. Ashton, 11 Peters, 229*, it is ruled that even admissions in an answer cannot under any circumstances lay the foundation for relief in equity, unless the matter be substantially set forth in the bill.

Without further elaboration, we submit, that the question presented by this record is by no means frivolous. How far the V. and XIV Amendments to the Constitution of the United States extend to protect the individual citizen, appears in *Martin v. Hunter's, Lessee, 1 Wheat., 305; Tennessee Davis, 100, U. S., 257;* and especially in *Yick Wo. v. Hopkins, 118 U. S., 356*, and the cases therein cited.

The occasion, and the purpose, of this XIV. Amendment are well known. We are simply claiming that it protects the white man in Pennsylvania as well as the black man in South Carolina. If it can be evaded, by so simple a process as that shown in this record, it is of little use. It appears to be the idea of the brief for defendants in error, that because the Court below does not expressly mention the constitutional points of plaintiffs in error, therefore there was no decision thereon. It is of course not worth while to spend time in arguing, that the overruling a claim of constitutional right, or a claim of any other right, by simply not noticing it, is a decision against the claim. In this case, not a single point presented by plaintiffs in error, either as to constitutional law, or jurisdiction of the courts, or pleading and practice, is in any way noticed by the Supreme Court below. Could we claim that none of these had been decided?

And if we could not so claim, can it be claimed against us?

If the Court had assumed to decree that we should go hang ourselves, and we were making the same objection to such order as we are making to the one in this case, would it be a satisfactory answer to say to us that the Supreme Court, upon our appeal to that Court, had merely decided that the Court sitting in equity had plainly the power to enforce its decrees, and therefore we had no right to a writ of error from this Court? In this XIV. Amendment, "life, liberty or property," are put in the same category, and a judge has no more right or power, without due process of law, to order a man to deliver up possession of his property, than he has to order him to deliver up possession of his life. If this Amendment will not protect a white man from being thus deprived of his property in Pennsylvania, how will it protect a black man from being similarly deprived in South Carolina, or any other State?

We cannot better close this argument than by quoting the language of Ch. J. Marshall in *Marbury v. Madison, 1 Cranch, 137, 163*, whe he says,—"The very essence of "civil liberty certainly consists in the right of every indi- "vidual to claim the protection of the laws, whenever he "receives an injury. One of the first duties of govern- "ment is to afford that protection." * * * "The "Government of the United States has been emphatically "termed a government of laws, and not of men. It will "certainly cease to deserve this high appellation, if the "laws furnish no remedy for the violation of a vested "right." And again on page 176, "That the people have "an original right to establish, for their future govern- "ment, such principles, as, in their opinion, shall most "conduce to their own happiness is the basis on which "the whole American fabric has been erected. The exer- "cise of this original right is a very great exertion; nor

"can it, nor ought it, to be frequently repeated. The prin-
"ciples, therefore, so established, are deemed fundamental.
"And as the authority from which they proceed is su-
"preme, and can seldom act, they are designed to be per-
"manent." * * * "The powers of the Legislature are
"defined and limited; and that those limits may not be
"mistaken or forgotten, the constitution is written. To
"what purpose is that limitation committed to writing, if
"these limits may, at any time, be passed by those in-
"tended to be restrained? The distinction between a
"government with limited and unlimited powers is abol-
"ished, if those limits do not confine the persons on
"whom they are imposed, and if acts prohibited and acts
"allowed, are of equal obligation."

In this case, if the Act of the Legislature conferring upon the Court sitting in Equity, jurisdiction in *partition*, was meant to confer upon them the power to try an ejectment without the intervention of a jury, or can justly be so construed, then it is clearly repugnant to the constitutional limitations to which we have referred, and therefore void. And if it was not so meant, and cannot properly be so construed, and the action of the learned Judge was, just what he termed it, an "assuming" a jurisdiction not conferred upon him, then it is equally clear that his action was a violation of the constitutional rights of the plaintiffs in error.

Respectfully submitted,

A. RICKETTS,

Counsel for Plaintiffs in Error.

Office Supreme Court U. S.
FILED.
DEC 16 1889
JAMES H. McKENNEY.
CLERK.

IN THE

Supreme Court of the United States:

No. 1453.

CHAS. J. CHURCH and JOSEPH CHURCH,

Plaintiffs in Error.

vs.

HELEN M. KELSEY, CRYENUS WISE and ANN WISE, his wife, SIDNEY PHILIP STEVENS, et, al.,

Defendants in Error.

Error to the Supreme Court of Pennsylvania

MOTION TO DISMISS OR AFFIRM.

H. W. PALMER,

Solicitor for Defendants in Error.

CHARLES J. CHURCH, and JOSEPH CHURCH *Plaintiffs in Error,* *vs.* HELLEN M. KELSEY, CYREUNES WISE and ANN WISE, his wife, SIDNEY PHILIP STEVENS, LETTY ANN RULAND, *et al.*	In the Supreme Court of the United States. No. 1453 Oct. T. 1889. Error to the Supreme Court of Pennsylvania.

Come now the defendants in error and move the Court to dismiss the writ of error in this cause for want of jurisdiction, because there is no federal question involved in said cause; or, if the writ of error shall not be dismissed, that the decree of said Supreme Court of the State of Pennsylvania be affirmed, on the ground that although in the opinion of this Court the record may show that this Court has jurisdiction, it is manifest that said writ of error was taken for delay only, and that the question on which the jurisdiction depends is so frivolous as not to need furthur argument

H. W. PALMER,
Counsel for Defendants in Error.

To A. Ricketts, Esq., Counsel for Plaintiffs in Error.

Please take notice, that on the 16th day of December, 1889, the motion, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States, for the decision of the Court thereon.

Annexed hereto is a copy of our brief or argument in suport of said motion.

H. W. PALMER,
Counsel for Defendants in Error.

BRIEF OF ARGUMENT IN SUPPORT OF MOTION TO DISMISS.

First. The original suit was a Bill in Equity for a partition of land held in common.

In due course a decree was made awarding $\frac{5}{9}$ of the land to the plaintiffs in error, and $\frac{4}{9}$ to the defendants.

After the decree was affirmed by the Supreme Court of Pennsylvania an appeal was taken to this Court, and the judgment was affirmed. It is reported in U. S. Reports No. 121, pg. 282 &c., and the question of the jurisdiction of the Equity Court to make the decree was established.

A mandate issued from this Court and the State Court proceeded to enforce the decree by requiring the plaintiffs to execute and deliver a deed to defendants for $\frac{4}{9}$ of the land. After the delivery of the deed the plaintiffs refused to surrender possession of the land they had conveyed. A petition was filed praying a writ of assistance. (See Record pg. 10.) This was refused on the ground that no formal demand for possession had been made. (See pg. 16.) But the Court made the following order:

"And now, to wit, July 25th, 1887, it is ordered that the said Joseph Church and Charles J. Church, the defendants in this case, on being served with a certified copy of this order, forthwith deliver up to the said Helen M. Kelsey and others, the plaintiffs in the case, their agent or attorney, the lands and premises allotted unto the said plaintiffs by the partition made and decreed in this case, the same as mentioned and described in the report of the commissioners herein and in the deed from the said defendants to the said plaintiffs executed in pursuance of said decree; and upon due proof of service of this order and the refusal of said defendants to comply therewith by delivery of the possession of the said lands and premises the said plaintiffs may apply for a writ of assistance according to the course and practice of the Court in such cases.

R. W. ARCHABALD,
Add. Law Judge."

From this order an appeal was taken to the Supreme Court and the same was affirmed. From this judgment the present writ of Error was taken.

It will be seen therefore that the only question submitted to or passed upon by the State Court was whether a Court of Equity in Pennsylvania has power to enforce a decree in partition by compelling a delivery of possession of the several purparts to the owners.

That the Courts of Equity in Pennsylvania had jurisdiction of this case and that no Constitutional right of the plaintiffs was infringed or denied by the decree is settled by the former decision and is not open for discussion in this case.

In the present case the record does not disclose,

a. That a federal question was presented to or decided by the Common Pleas of Lackawanna County Sitting in Equity or by the Supreme Court on appeal.

b. Or that to determine such a question was neccessary for the decision of the case.

c. Or that judgment as rendered could not have been given without deciding a federal question.

The order from which the appeal was taken is printed above. No exception was taken in the lower Court. The opinion of the Judge, pg. 13, shows that he decided no federal question if any was presented to him. The assignment of Error in the Supreme Court was as follows: Page 17.

"It is respectfully submitted that the Court erred in making the order of July 25th, 1887, commanding Joseph Church and Charles J. Church to deliver up to Helen M. Kelsey and others the lands in their possession, held and claimed by them by virtue of a complete legal title against which there had been no legal adjudication, as well as other lands which were not in their possession and which they could not deliver."

The opinion of the Supreme Court was as follows: Page 19.

"If it be at all neccessary to prove so obvious a proposition as that a Court of Equity has the power to enforce its own decrees, that proof may be found in the

able opinion of the learned Judge of the Court below. The appeal is dismissed and the decree affirmed, at costs of appellant."

It thus appears that the sole question decided was that a writ of assistance, which is an ancient and well known process, might be used to enforce a decree of a Court of Equity. Only this and nothing more.

AUTHORITY.

"To give this Court jurisdiction of a writ of Error to a State Court it must appear affirmativly, not only that the federal question was presented for decision to the highest Court of the State having jurisdiction, but that the decision was neccessary to the determination of the cause and that it was actually decided, or that judgment as rendered could not have been given without deciding it."

Brown vs. Atwell, 92 U. S. 237.
Citizens' Bank vs. Board of Liquidation, 98 U. S. 140.
Chouteau vs. Gibson, 111 U. S. 200.
Adams Co. vs. B. & M. R R. 112 U. S. 123.
Detroit R. R. vs. Goathard, 114 U. S. 123.
N. O. Water Works vs. La. Sugar Refining Co. 125 U. S. 18.

"Where it appears by the record that the judgment of the State Court might have been based either upon a law which would raise a question of repugnancy to the Constitution, Laws, or Treaties of the United States or upon some other independent ground and it appears that the Court did in fact base its judgment on such independent grounds, this Court will not take jurisdiction of the case even though it might think the position of the Court an unsound one."

Klinger vs. Missouri, 13 Wall 257, 263.
DeSausure vs. Guillard, 127 U. S. 216, 233.

"If it does not appear on which of two grounds the judgment was based, then if the independent ground on which it might have been based was a good and solid one

sufficient of itself to sustain the judgment, this Court will not assume jurisdiction of the case."

Klinger vs. Missouri, 13 Wall 263.

In this case no federal question was raised in the Supreme Court of Pennsylvania by the assignment of Error, and no such question was decided. Neither was the decision of a federal question neccessary for a determination of the case.

THE EXCEPTIONS ARE FRIVOLOUS.

The only intimation of a federal question to be found in the record is in the answer of the plaintiffs in error to the petition for a writ of assistance.

It is as follows:

"The application now made by the plaintiffs is a request to the Court to make an arbitrary and unwarranted order and to assume a power which would be illegal and subversive of the rights of the defendants, being in direct violation of the rights guaranteed to them by the 9th and 11th sections of Article I of the Constitution of Pennsylvania, and by Section 10 of Article I of the Constitution of the United States and the 5th and 14th Amendments to the same, the application being for an arbitrary order that defendants shall deliver to plaintiffs the possession of certain lands, the plaintiffs having never obtained a decree for such delivery of possession nor having ever obtained an adjudication upon the defendant's right of possession."

The portions of the State and Federal Constitutions are as follows:

Sec. 9, Art. I. "In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and, in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage; he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty, or property, unless by the judgment of his peers or the law of the land."

Sec. 2, Art. I. "All Courts shall be open, and every man, for an injury done him in his lands, goods,

person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the commonwealth in such manner, in such Courts, and in such cases as the Legislature may by law direct."

Sec. 10, Art. I. "No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts; or grant any title of nobility."

Amendments, Art. V. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense, to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself; nor to be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use without just compensation."

14th Amendment. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The exceptions, page 23 of record, may be disposed as follows:

The 1st and 2nd are answered by the decree of this case by this Court in U. S. Report, No. 121, pg. 282 &c.

3. The bill stated a case requiring the relief given by the writ of assistance. It contained a prayer covering the action viz. the prayer "for such other relief as the case might require" and the pleadings fully warranted the decree and writ.

4. The decree was not fully complied with until possession was surrendered and the petition for the

writ of assistance and the answer thereto constituted sufficient pleading to warrant the Court in issuing the process.

The complaint seems to be that the order prayed for viz. that a writ of assistance should issue, would be "an arbitrary order that defendants shall deliver the possession of certain lands, the plaintiffs having never obtained a decree for such delivery of possession, nor having ever obtained an adjudication upon the defendants' right of possession."

The objection is frivolous.

1. Because after a decree dividing the land and directing a conveyance the right of possession followed as necessary consequence.

2. The prayer of the bill was for a partition and "such further and other relief as to the Court should seem meet and the nature of the case should require."

It was entirely unnecessary to include an order for possession in the decree. The writ of assistance might properly issue without it.

Kershaw vs. Thompson 1. *1 Bro. Ch. 375.*
1 Johnson Ch. 609. *1 Cox. 101.*
Dove vs. Dove, Dickens 617. *Montgomery vs. Tutt., 11 Cal. 194.*

That a Court of Equity has power to enforce a decree for conveyance by giving a suitor possession without sending him to another tribunal is established by abundant authority.

It is said by Chief Justice *Beasley in Beatty vs. DeForrest 27 N. J. Equity 483.* "In my opinion a purchaser under a decree having a Sheriff's deed has as much right to the assistance of the Court to be put in possession as a plaintiff in a Court of law has to an execution after judgment * * * The remedy is founded on the general principle that a Court of Equity, will, when it can do so, justly carry its own decree into full execution without relying on the co-operation of any other tribunal."

And by Mr. Justice Field in *Terrell vs. Allison, 21 Wal 291.* "The power to issue the writ results from the principle that the jurisdiction of the Court to enforce its decree is co-extensive with its jurisdiction to determine the rights of the parties and to subject to sale the property mortgaged. It is a rule of that Court to do complete justice when that is procurable, not merely by declaring the right but by affording a remedy for its enjoyment. It does not turn the party to another forum to enforce a right which it has itself established."

All that was done in the case was in conformity with the well established practice of Equity Courts in the United States and England.

There was a competent tribunal; regular pleading; a full hearing of the parties; and a proper and lawful judgment.

Has the Supreme Court of the United States power to supervise the execution process by which the State Courts enforce lawful judgment or to prescribe the form of writs?

"Due process of law" is any process instituted by a State for settlement of disputes when there is a plaintiff, defendant, issue joined, a competent tribunal and a judgment.

Derr vs. Hoboken Land & Improvment Co., 18 How 272.
Pearson vs. Yewdell, 5 Otto 294.
Edward vs. Elliott, 21 Wall 557.
Pennoyer vs. Neff, 5 Otto 714.

The able opinion of Judge Archbald sitting as a chancellor which was adopted by the Supreme Court, is a full and unanswerable vindication of the rightfulness of the process of which complaint is made.

We ask for the reason assigned that the writ be dismissed or the judgment affirmed.

If this case is reviewable here then any case tried in a State Court may be brought into the Supreme Court of the United States whenever counsel can be found with hardihood enough to put somewhere on the record without shadow of reason a claim that some imaginary constitutional right of his client may be invaded.

WRIT OF ERROR DOES NOT LIE FOR IRREGULARITY IN FINAL PROCESS.

"Whatever may be the defects or illegalities of final process, no Error can be assigned in the Supreme Court of the United States for that cause."

Ames vs. Smith, 16 Peters 303, 311.

Boyle vs. Zacharie, 6 Peters 635, 657.

"The refusal to quash (an execution) is not in the sense of the common law a judgment, much less is it a final order. Even at common law error only lies from a final judgment and by the express provisions of the judiciary Act of 1786, Chap. 20, Sec. 22, a writ of error lies to this Court only in case of final judgment." *Ibid 657.*

The judgment in this case awarded the writ of assistance against the objection of the Plaintiff in error and was therefore equivalent to a rejected motion to quash.

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